UNITED STATES
v.
MIGUEL NUNEZ

IBLA 81-82 Decided October 26, 1981

Appeal from decision of Administrative Law Judge R. M. Steiner declaring Dixie Creek consolidated placer mining claim null and void.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

3. Mining Claims: Discovery: Generally

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral

> deposit has not been found simply because the facts might warrant further search for such a deposit.

APPEARANCES: James A. Miller, Esq., Oakland, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Miguel Nunez appeals from the September 23, 1980, decision of Administrative Law Judge R. M. Steiner, which declared the Dixie Creek placer mining claim null and void. The Dixie Creek placer mining claim is a consolidation of the Dixie Creek and the Lonesome Coyote placer mining claims covering approximately 155 acres along the New River, about 2 miles above its confluence with the Trinity River. 1/ The land had not been withdrawn as of the time of the initiation of the contest.

The Bureau of Land Management (BLM) initiated this mining claim contest on behalf of the Forest Service, U.S. Department of Agriculture. The complaint charged, inter alia, that the claimant had not disclosed, within the limits of the claim, minerals of sufficient quantity and quality to constitute a discovery under the mining laws of the United States. Judge Steiner concluded from the evidence and testimony presented at the hearing that the contestant had made a prima facie case to sustain the charge of no discovery and that the claimant had failed to overcome it.

On appeal, appellant argues that the Government did not establish a prima facie case because the Government mineral examiner did not correctly sample the "high bar" or ridge section, denominated as Area G of Exhibit 10, and further contends that the mining examiner's determinations were too speculative to be of any probative value.

Alternatively, appellant argues that Judge Steiner improperly ignored the testimony of both the claimant and his expert witness, Paul Travis, so that even if a prima facie case had been made by the Government, claimant's testimony more than overcame the Government's showings. Appellant asserts that Judge Steiner erred in characterizing Travis' samples as isolated and in discounting his testimony that the mine fulfilled the "prudent man" test.

[1] The discovery of a valuable mineral deposit within the limits of a mining claim is essential to a valid location. 30 U.S.C. §§ 23, 35 (1976). A discovery exists "where minerals have been found and the

1/ The consolidated claim is located in SE 1/4 SW 1/4 SW 1/4 and W 1/2 SW 1/4 SE 1/4 SW 1/4 sec. 25; S 1/2 NE 1/4 and N 1/2 NE 1/4 SE 1/4 sec. 35; W 1/2 SW 1/4 NW 1/4, S 1/2 SW 1/4 NW 1/4 NW 1/4, SE 1/4 NW 1/4 NW 1/4, E 1/2 NE 1/4 NW 1/4 NW 1/4, and E 1/2 NE 1/4 NW 1/4 NW 1/4 sec. 36, T. 6 N., R. 6 E., Humboldt meridian, Trinity County, California.

evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, supra; Converse v. Udall, supra.

[2] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish prima facie case; then the burden shifts to the claimant to overcome the Government's showing by a preponderance of the evidence. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The mining claimant, as the proponent of his claim, then bears the risk of nonpersuasion. Foster v. Seaton, supra; United States v. Arcand, 23 IBLA 226 (1976).

The Government's prima facie case consisted of the testimony of the Forest Service mineral examiner, Robert Manchester. Manchester examined the Dixie Creek on September 1, 1977, and took various samples. He calculated that, at gold values of $170 per ounce, the samples showed values of $0.03 per cubic yard to $0.80 per cubic yard. At $380 per ounce, the samples' values ranged from $0.06 per cubic yard to $1.78 per cubic yard. Manchester stated that he believed that the $0.40 per cubic yard value shown by the original locator of this claim ($4.57 per cubic yard at $400 per ounce gold prices), was only for areas the original locator had mined out (Tr. 44). Manchester adverted to the increase in mining costs, particularly given pollution control restrictions, and concluded that the gold values on this claim would not encourage a prudent miner to develop the claim.

On appeal, claimant charges that Manchester's testimony was insufficient to establish a prima facie case. The cases which appellant cites to support this contention, however, are simply inapposite to the facts disclosed herein. Thus, in United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971), this Board noted:

> Where a Government mineral examiner offers his expert opinion that discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses. But an expert's

> opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee. The admissibility of expert testimony in a mining claim contest is determined by the hearing examiner, who exercises a wide latitude of discretion in making these determinations.

2 IBLA at 335-36, 78 I.D. at 195. In that case, however, while the contestee therein argued that at least two of the samples were not cut to bedrock, the Board noted that "[e]ven assuming that the mineral examiners did not sample the two cuts to bedrock, this is insufficient to show their testimony as to the other samples and their overall evaluation of the claim was in error and must be disregarded" Id. It was expressly noted in Winters, as it has been numerous times both before and since, that it is the duty of the claimant to keep discovery points available for inspection. The Government mineral examiner is not required to perform discovery work, to explore or sample beyond a claimant's workings, or to conduct drilling programs for the benefit of a claimant. See Henault Mining Co. v. Tysk, 419 F.2d 786 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Russell, 40 IBLA 309 (1979). Rather, the claimant is the proponent of the validity of his claims and bears the ultimate burden of maintaining his discovery points in an accessible condition.

The other case cited by appellant is also not on point. In United States v. Hess, 46 IBLA 1 (1980), the question before the Board was whether the testimony of a mineral examiner, who had admittedly not physically examined certain claims (which were accessible), could establish a prima facie case as to those claims. In that case, we held that such testimony would be insufficient to establish a prima facie case premised on the lack of mineralization within those unexamined claims.

The instant case, however, stands in stark contrast to United States v. Hess, supra. Robert Manchester testified as part of the Government's case as to his extensive traversing of the claim from Area A in the northern section to Area G in the southern section. Samples were taken from Areas A, B, and C (DC-1 (A to D) and DC-2), as well as area H (DC-3 (A and B)). Manchester examined Area G, but took no samples since "[t]here was absolutely nothing that I could find to get into an adequate sample that could be taken to undisturbed material. It was all sloughed material, and consequently no area was in any condition for sampling * * *" (Tr. 32). Manchester stated that he asked the claimant where his discovery was located and where the best value could be located, and sampled accordingly (Tr. 62-63). In our opinion, the Government clearly met its burden of establishing a prima facie case. The burden thus devolved upon the claimant to overcome the showing by a preponderance of the evidence.

[3] With respect to the contention that the testimony of claimant's expert, Paul Travis, overcame the Government's showing, we note

that, to the extent that an Administrative Law Judge's decision is premised on a resolution of conflicting testimony, this Board has traditionally accorded such findings great deference. As we recently noted: "This deference is based on the realization that the trier of fact, who presides over a hearing, has an opportunity to observe the witnesses and is in the best position to judge the weight to be accorded conflicting testimony." Holland Livestock Ranch, 52 IBLA 326, 350 (1981). See also United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973).

Judge Steiner's review of the evidence is set forth in his decision (Decision at 2-7). It is clear from his findings and conclusions that he was unconvinced by the evidence presented by appellant. Our own review of the record discloses no basis upon which we could disagree. Travis' testimony, while at places favorable to the claimant, tended to be based on extrapolations unsupported by independent evidence (see, e.g., Tr. 258, 269, 276, 308). 2/ While isolated showings might well induce a prudent prospector to continue in his search for a discovery, they cannot substitute for the discovery which is the sine qua non of any claim's validity. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). We therefore affirm Judge Steiner's showing that, on the basis of the present record, appellant has simply failed to show that a discovery presently exists within the limits of the claim.

2/ Moreover, Travis' criticism of Manchester's sampling technique for the four samples in DC-1 (A to D), and the conclusion he seeks to draw therefrom, are internally inconsistent. Thus Travis, while indicating that sampling should have been conducted "perpendicular to the thrust of the excavation" (Tr. 293-94), criticized the fact that it appeared that Manchester's first three samples (A to C) were taken on a sloping surface. He contended that this error was compounded because sample DC-1-D, which was taken to bedrock, and which is where Travis contended that the best values were found (Tr. 77, 311), was a vertical sample (Tr. 296). The effect of this, he concluded, was an error on the order of 180 percent, by which factor the values of DC-1-D should be increased.

Even if we assume the exact error which Travis hypothesized, however, it is impossible to see how Travis' solution can be correct. Admittedly, if the four sample points had been part of a consolidated sample, there would be the likelihood of distortion. But, as the assay report clearly shows (Exh. 16), each sample was individually assayed. Moreover, rather than applying a corrective factor to sample DC-1-D, which even Travis admits was properly taken, any corrective factor should be applied to the other three samples. Inasmuch as Travis argued that the highest values were obtainable at bedrock, and admitted that the bedrock sample, itself, was properly taken, we fail to see any logical justification for multiplying the values which Manchester's assay showed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge